

No. 14687.

IN THE

**United States Court of Appeals
FOR THE NINTH CIRCUIT**

SHELLY FISHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California Central Division

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	3
Specification of errors.....	5
Argument	6

I.

The evidence is insufficient to sustain the judgment of conviction on either Count Three or Count Four and the trial court erred in not granting appellant's motion for acquittal	6
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II.

The evidence against appellant on Counts Three and Four was obtained through illegal search and seizure.....	10
Conclusion	13

TABLE OF AUTHORITIES CITED

CASES	PAGE
Agnello v. United States, 269 U. S. 20.....	11
People v. Hill, 77 Cal. App. 2d 287.....	9
Stoppeli v. United States, 183 F. 2d 391.....	7, 9
United States v. Asendio, 171 Fed. 2d 122.....	11, 12, 13
United States v. Jeffers, 342 U. S. 48.....	10
United States v. Lee, 83 F. 2d 195.....	11
United States v. Pincourt, 167 F. 2d 831.....	13
United States v. Pisano, 193 F. 2d 355.....	7
United States v. Ward, 168 F. 2d 226.....	12
STATUTES	
United States Code, Title 21, Sec. 174.....	1, 2, 12
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	3
United States Constitution, Fourth Amendment.....	10, 11, 12, 14

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Jurisdictional Statement.

This is an appeal by Shelly Fisher from a judgment of the District Court of the United States for the Southern District of California, convicting appellant of violating Section 174 of Title 21 of the United States Code. Appellant was convicted of two separate violations as charged in Counts Three and Four of the Indictment. Appellant was sentenced to 5 years imprisonment on Count Three and 5 years imprisonment on Count Four, said sentences to run consecutively. Appellant was also ordered to pay a fine of \$25.00 on each of the two Counts.

The District Court had jurisdiction by virtue of the provisions of Title 18 of the United States Code, Section

3231, which give the District Court of the United States original jurisdiction of all offenses against the laws of the United States. Appellant was prosecuted under an Indictment which alleged violations of a law of the United States. The Indictment [Clk. Tr. pp. 1-4] charged two violations of Title 21 of the United States Code, Section 174, and alleged in Count Three that on or about the 22nd of July, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, appellant and defendant Shurley Oliver Burse, after importation, did knowingly and unlawfully sell and facilitate the sale of approximately 92 grains of heroin, a narcotic drug, to Malcolm P. Richards, which heroin, as appellant then and there well knew, had been imported into the United States contrary to law. Count Four of the Indictment alleged that on or about July 22, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, appellant did, after importation, knowingly and unlawfully receive, conceal and facilitate the transportation of, approximately 450 grains of heroin, a narcotic drug, which said heroin, as appellant then and there knew, had been imported into the United States of America contrary to law.

Appellant pleaded not guilty [Clk. Tr. p. 6] and, after a trial by the court without a jury, a jury having been waived, appellant was adjudged guilty as charged in Counts Three and Four of the Indictment.

The United States Court of Appeals has jurisdiction of appellant's appeal by virtue of the provisions of Title 28 of the United States Code, Section 1291, which give the United States Court of Appeals jurisdiction of appeals from all final decisions of the District Courts of the United States.

The judgment of conviction and sentence [Clk. Tr. pp. 26-27] is a final decision of the United States District Court. This appeal is taken to the United States Court of Appeals for the Ninth Circuit by virtue of the provisions of Title 28 of the United States Code, Section 1294.

Statement of the Case.

No attempt will be made to relate the testimony of the individual witnesses for the government. In substance the evidence for the government was as follows: On the morning of July 22, 1954, a narcotics agent met with two deputy sheriffs of the Los Angeles County Sheriff's Department and jotted down on a piece of paper the serial numbers of \$175.00 in bills of \$20.00, \$10.00, and a \$5.00 bill. Thereafter, at about 8:30 A. M., a Federal narcotic agent went to the home of defendant Shurley Burse and after Burse had made and received a telephone call, gave Burse \$155.00 of the \$175.00. The agent then drove Burse, at about 9:30 A. M. of the same day, to the vicinity of 35th Place and Denker Avenue; that Burse left the car and later returned to the car and handed the agent a brown paper in which there was a white envelope containing heroin; that the agent then drove Burse to 20th and Compton Avenue and placed him under arrest. Shortly thereafter, Burse was searched and a \$20.00 bill and a \$5.00 bill, which were part of the original \$155.00 given to Burse was taken from his person. Burse was then driven to the vicinity of 2430 Rimpau Boulevard and there Burse pointed out a 1941 Packard automobile. Thereafter, Burse was taken to the corner of Normandie and Adams Boulevard and after spending some time there, Burse made a telephone call and the officers overheard Burse call the name of Shelly and the man on the other

end of the telephone stated "36th and Ninth Avenue." Burse was then driven to 36th and Ninth Avenue where Burse entered an automobile driven by appellant. The officers followed this automobile, overtook the same and placed appellant under arrest.

Before the time that Burse got into the automobile with appellant at 36th and Ninth Avenue, appellant was observed to get into the Packard automobile in front of 2430 Rimpau Boulevard and drive away. Appellant was also seen to go into an apartment building at 28th and Montclair Streets. Appellant was stopped in his automobile and placed under arrest at 23rd and 6th Avenue. Appellant was searched and \$128.00 and some cents found on his person. Of this sum, \$120.00 consisted of part of the \$175.00 in bills, the serial numbers of which had been taken down by the officers.

Keys were taken from appellant by the federal agents and they took one key and went to the apartment building at Montclair and 28th Street, and found that the key fit a particular lock to a door in the apartment building. The agents then went back and brought appellant to this apartment in the apartment building and used the key, entered and carried appellant into the apartment. This apartment was searched and the federal agents found in the apartment the heroin referred to in Count Four of the Indictment. The officers remained in the apartment for about five or six hours and at the end of that time, a Flora Frazier came to the apartment from work. Said Flora Frazier was the occupant of the apartment and she testified that she had given appellant a key in order for appellant to do some painting in the apartment for her. Another key was kept under the mat in front of the apart-

ment door to be used by a neighbor to come in and make telephone calls. While the federal agents were in the apartment, the neighbor started into the apartment to make a telephone call.

Appellant denied having any knowledge of the narcotics found in the apartment. Defendant Burse testified that the narcotics in the apartment belonged to him and that he had not purchased any narcotics from appellant. Defendant Burse also testified that of the \$155.00 given him by the agent, he gave \$125.00 to appellant as part repayment on previous loans made from appellant. Burse also testified that he had agreed to help appellant with the painting and cleaning work in the apartment and had taken the narcotics to the apartment without any knowledge of his act on the part of appellant. Appellant testified that he knew nothing about the narcotics in Mrs. Frazier's apartment, and that he had not let Burse have any narcotics and that the money found on him by the agent was money that Burse had given to him for previous loans.

Specification of Errors.

Appellant urges the following points for reversal of the judgment of conviction:

I. The evidence is insufficient to sustain the judgment of conviction on either Count Three or Count Four and the trial court erred in not granting appellant's Motion for Acquittal.

II. The evidence against appellant on Counts Three and Four was obtained through illegal search and seizure.

ARGUMENT.

I.

The Evidence Is Insufficient to Sustain the Judgment of Conviction on Either Count Three or Count Four and the Trial Court Erred in Not Granting Appellant's Motion for Acquittal.

At the conclusion of the government's case, appellant made a motion for judgment of acquittal. [Rep. Tr. p. 205.] Appellant's motion was denied by the trial court. [Rep. Tr. p. 214.] Appellant's motion should have been granted as the government's evidence was insufficient to sustain appellant's conviction on either Count Three or Count Four.

With respect to Count Three of the Indictment, which may be referred to as the "Sales Count," the evidence merely establishes that defendant Burse made a sale of narcotics to Agent Richards. There is no evidence in the record which establishes that appellant supplied Burse with the narcotics which Burse sold to Agent Richards. Some circumstantial evidence was offered but it is clearly insufficient. The transaction of sale between the defendant Burse and Agent Richards on the morning of July 22, 1954, was completed by 10:20 A. M. Prior to, and at that time, there is no evidence pointing to appellant's participation in this transaction. Later in the afternoon, Burse meets appellant, gets into appellant's car and appellant is then overtaken and arrested. No narcotics were found in appellant's possession. The presence of \$120.00 of marked money on appellant is merely a suspicious circumstance, but is insufficient to prove appellant's guilt beyond a reasonable doubt.

The evidence against appellant with respect to Count Three is not unlike the evidence against defendant on Counts 13, 14 and 15 of an Indictment in the case of *United States against Pisano*, 193 F. 2d 355. In the *Pisano* case, the evidence with respect to Counts 13, 14 and 15 of the Indictment there involved established that on June 24, 1949, one Taylor, after having met Bowman at 47th and Prairie Avenue, Chicago, was driven in the vicinity of the Cook County Hospital. Bowman, after receiving \$150.00, left the car and returned a short time later and handed Taylor a package. Although defendants Pisano and Ginnone were seen in the vicinity in a light green automobile and at various places in and about where Taylor and Bowman appeared, there was no evidence that Bowman, at that time, made any contact with either Pisano or Ginnone. Accordingly, the Court of Appeals stated that the evidence was insufficient to support a verdict upon the counts of the Indictment relating to that incident.

The rule of law is clear that in order to find a defendant guilty on circumstantial evidence alone, the proved circumstances must not only be consistent with the hypothesis that the defendant is guilty of the crime, but the proved circumstances must be irreconcilable with any other rational conclusion. This rule was stated in *Stoppeli v. United States*, 183 F. 2d 391, at page 393 as follows:

“We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence.”

Likewise, the evidence is insufficient to convict appellant of Count Four of the Indictment. It will be pointed out

under Point II of the Argument that the government's evidence relating to Count Four was obtained through an illegal search and seizure, but even assuming that the evidence was not so obtained, it is still insufficient to sustain appellant's conviction. The narcotics involved in Count Four of the Indictment were found in an apartment to which appellant possessed a key. However, the evidence established that the apartment was occupied by one Flora Frazier and that appellant had a key for the purpose of doing certain work in the apartment. The evidence also established that other persons had access to the apartment because of a key which was kept under the mat in front of the door. Other persons having gone to and from the apartment, as established by the evidence, were Sally Frances Sheffield and her husband. Appellant denied any knowledge of the existence of narcotics in the apartment. Flora Frazier, the occupant of the apartment, and Sally Sheffield likewise denied any knowledge of the narcotics found in the apartment.

It is significant that the government did not produce Mrs. Sheffield's husband who was one of the persons proved to have gone in and out of the apartment. Defendant Burse admitted that the narcotics found in the apartment belonged to him and exonerated all other persons, including appellant.

Had the trial court believed appellant's testimony and that of defendant Burse, appellant's conviction could not have resulted. But even if the trial court disbelieved the testimony of Burse and appellant, this disbelief is not affirmative evidence of appellant's guilt. At best, the government's evidence established that defendant Burse was the only individual who had possession of any nar-

cotics. The circumstances that narcotics were found in an apartment to which appellant had access becomes meaningless in the face of the evidence that other persons also had access to this apartment. Under the doctrine of the *Stoppeli* case, the circumstances were not inconsistent with the innocence of appellant and, hence, insufficient to establish appellant's guilt beyond a reasonable doubt.

With respect to both Counts Three and Four, appellant is entitled to the benefit of the rule so aptly expressed in *People v. Hill*, 77 Cal. App. 2d 287, as follows:

“. . . By all the evidence favorable to the state's contention nothing was established but a suspicion of appellant's guilt. The testimony of the People's witnesses is devoid of act or word that may be interpreted as competent proof of a crime. If the trial court had believed the two convicts and appellant, the latter's conviction could not have resulted for they completely exculpated him. If it disbelieved them, as of course it was privileged to do, a conviction was out of the question, for the record discloses that the total of the state's evidence is wanting in the essentials of proof of an established crime. To suspect an accused is the privilege of the prosecutor, judge or laymen when he has been found in the company of criminals. But to put the brand of infamy upon a person because he has been brought to the bar can find no justification in law or morals. To do so is to disregard legal principles long cherished. Appellant entered the courtroom clothed with the assumption of innocence which shielded him until his guilt was established beyond a reasonable doubt. . . .”

People v. Hill, 77 Cal. App. 2d 287, 292.

II.

The Evidence Against Appellant on Counts Three and Four Was Obtained Through Illegal Search and Seizure.

Appellant's conviction cannot stand because the Government's Exhibits 6, 7, and 8 were all secured by an illegal search and seizure. These exhibits were obtained by an illegal search of the premises at 3809½ Montclair. The search of this apartment was without a warrant and violated the provisions of the 4th Amendment to the United States Constitution.

There is no dispute that appellant was arrested in an automobile at 23rd and 6th Avenue, and placed under arrest at that point. [Rep. Tr. p. 96.] Appellant was then taken to Montclair and Adams. [Rep. Tr. p. 100, line 1.] The agents then took keys from the appellant, including a key which the agents used to open the door of the apartment at 3809½ Montclair. This apartment was then searched in the absence of the occupant, Flora Frazier, without a warrant and Government Exhibits 6, 7 and 8 were found and seized. That the search of Mrs. Frazier's apartment and the seizure of Exhibits 6, 7 and 8 violated the 4th Amendment to the United States Constitution is not open to question.

The case at bar is similar to that of *United States v. Jeffers*, 342 U. S. 48. In the *Jeffers* case, government officers, without a warrant for either search or arrest, but with reason to believe that defendant had narcotics unlawfully concealed in a hotel room, entered the hotel room of the defendant's aunts, and in their absence and even in the absence of defendant, entered the room and seized narcotics found there. This search of a room not

occupied by a defendant was held to be a violation of the 4th Amendment and the Supreme Court held that the narcotics so seized should have been excluded as evidence in the defendant's trial for violation of the narcotic laws.

Even though there is a right to search a man's dwelling incidental to an arrest, this right cannot extend to the search of a man's dwelling several blocks distant to the place of arrest. This was so held in *Agnello v. United States*, 269 U. S. 20.

In *United States v. Lee*, 83 F. 2d 195, it was held that the advice of an informer and an alleged odor of opium in the crack of a door in a dwelling was insufficient to justify search of the premises and arrest of the inhabitants. The court stated the principle of law involved in the following language:

“Without a warrant, seizure upon the search of a home can only be justified if it was an incident to a contemporaneous arrest there.”

United States v. Lee, 83 Fed. 2d 195, 196.

The case at bar is practically on all fours with *United States v. Asendio*, 171 F. 2d 122. In the *Asendio* case, a federal narcotic agent saw a public entertainer, who was a former drug addict, hand a small package wrapped in white paper to the defendant, her road manager, on a street corner. The said agent, together with other federal agents, followed the entertainer and her agent to a hotel. The said agents then secured the help of the city police and agents and the police then went to the hotel room of the defendant. The door was open and the federal agents even asked the defendant if they could search the room and the defendant said “go ahead.” Under the bed, the defendants found the package which was passed to the

defendant by the entertainer on the street corner and this package contained heroin. At the trial, the defendant was convicted by the court without a jury of a violation of Section 174 of Title 21 of the United States Code. The defendant made no motion to suppress the evidence or object to its admissibility. The defendant raised the point of the illegal search and seizure at the time of sentencing of the defendant by the trial judge.

In the *Asendio* case, the Court of Appeals held that the search without a warrant was illegal and in violation of the 4th Amendment and that the federal officers had plenty of time in which to secure a search warrant. With equal force it may be said in the case at bar that the federal officers had plenty of time in which to secure a search warrant before searching Mrs. Frazier's apartment where the narcotics were found.

It is to be noted that in the case at bar, appellant's counsel did not move to suppress the evidence obtained by the illegal search, nor did the appellant's counsel object to the introduction of the seized articles into evidence. In the *Asendio* case, the Court of Appeals held that defendant's failure to move to suppress the evidence or to object to its introduction was not a waiver of the defense. In so holding, the Court of Appeals referred to two other cases from the Third Circuit where reversals were made without appropriate objection below. In *United States v. Ward*, 168 F. 2d 226, defendant's conviction was reversed because the trial judge inferred to the jury that failure of an accused to testify could be considered together with the testimony as to guilt. Defendant's conviction was reversed even though defendant didn't assign this error as a basis for appeal. And in *United*

States v. Pincourt, 167 F. 2d 831, defendant's conviction was reversed upon a ground discovered after an appeal had been taken.

So, in the case at bar, appellant is entitled to a reversal of his conviction because of evidence obtained by illegal search and seizure even though the point of illegal search and seizure was not raised by appellant's counsel below. Appellant, in the case at bar, is entitled to the benefit of the principle enunciated in *United States v. Asendio*, 171 F. 2d 122, at page 125, where the court said:

“. . . We should find it difficult to support the position that a basic constitutional right of the defendant can be denied because his counsel failed to object before or at the introduction of the colorable evidence.”

There is another point which cannot be overlooked. If appellant had supplied Burse with the narcotics sold to agent Richards appellant's finger prints would have been on the package. The government produced no finger print testimony although the evidence established that the government had the envelope, which is Government's Exhibit "2", processed for possible finger prints. [Rep. Tr. p. 14.]

Conclusion.

The evidence favorable to the government establishes at best a suspicion of appellant's guilt of the two violations charged in Counts Three and Four. If the trial court had believed appellant's testimony and that of defendant Burse, appellant's conviction obviously could not have resulted. But even if the trial court had disbelieved the testimony of appellant and of defendant Burse, this dis-

belief cannot be considered affirmative evidence pointing to appellant's guilt.

It is clear that all of the evidence relating to Count Four and some relating to Count Three of the Indictment was obtained through an illegal search and seizure in violation of the 4th Amendment. Without such evidence there is *no* evidence at all against appellant as to Count Four and no evidence other than pure suspicion against appellant as to Count Three.

For the reasons stated, therefore, appellant urges a reversal of the judgment of conviction.

Respectfully submitted,

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